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IN THE

Supreme Court of the United States

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

On Appeal from an Order of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

RESPONSE TO MOTIONS TO DISMISS OR AFFIRM

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INTRODUCTION

The Prisoner Release Order at issue in this appeal poses a grave and immediate threat to public safety in the State of California by requiring the release or non-incarceration of at least 38,000 California prisoners over the next two years. The Release Order is unnecessary, premature, and, as a result, constitutionally impermissible. Indeed, no similar order has been issued over an objection in the fourteen year history of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA").

If permitted to stand, the legal errors committed by the three-judge court will have serious consequences for public safety in California and will impose substantial federalism costs by intruding into a sensitive area of state policymaking. The three-judge court's decision strikes at the heart of the PLRA by simply assuming the existence of ongoing constitutional violations while simultaneously barring evidence and argument establishing the absence of such violations. Likewise, the three-judge court's order undermines the PLRA's design that prisoner release orders remain a "remedy of last resort" by concluding that, notwithstanding the court-appointed Receiver's opinion that a prisoner release order was not necessary, the Prisoner Release Order is warranted. The three-judge court's conclusion, moreover, eviscerates the PLRA's requirement that a prisoner release order be narrowly-tailored by issuing the Prisoner Release Order and, at the same time, acknowledging that: (1) there is no assurance that the Release Order will remedy constitutional violations relating to medical and mental health care of the prison population; and (2) the direct beneficiaries of the Release Order will extend well beyond class member inmates. Finally, the decision of the three-judge court fails to give substantial weight to public safety. This Court's plenary review of the three-judge court's decision is necessary.[1]

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[1] Recognizing the Prisoner Release Order violates the requirements of the PLRA in multiple respects, Appellees seek desperately to avoid review by claiming that the issues here are so "fact-intensive" as to render this case "a poor candidate" for plenary review. *Coleman* Appellees' Motion 17-18. This is nonsense. This appeal presents substantial questions of law and interpretation of the PLRA, never addressed by this Court, that impact directly the relationship between the federal courts and

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

To protect the ability of states to operate and maintain their own criminal justice systems and to protect public safety, the PLRA permits federal courts to issue prisoner release orders only under limited circumstances. None of these circumstances were properly established in the three-judge court proceedings below.

The legal questions raised by this appeal are of substantial importance and implicate (1) whether the court below was required to find and enumerate current constitutional violations prior to issuing a prisoner release order; (2) the interpretation of the PLRA's requirement that no alternative to a prisoner release order exists and that any such order must be narrowly tailored to remedy the defined scope of the constitutional violations by the least intrusive means necessary; and (3) the interpretation of the PLRA's requirement that a three-judge court give "substantial weight" to public safety prior to the issuance of any prisoner release order. Whether alone or in concert, the importance of each of these questions is sufficiently substantial to justify the notation of probable jurisdiction over this appeal by the Court.

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the ability of states to carry out core functions relating to policy-making and public safety. Few, if any, legal questions are more important or more deserving of the Court's plenary review.

I. THE PRISONER RELEASE ORDER SHOULD NOT HAVE ISSUED BECAUSE THERE WAS NO DETERMINATION THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED.

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that – (i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). The Prisoner Release Order issued below failed to meet either of these requirements.

First, the PLRA is written in the present tense and permits issuance of prospective prisoner release orders only to correct current and ongoing violations of Federal rights. Notwithstanding this mandate, the three-judge court refused to determine whether past violations remained "current and ongoing" at the time of the trial, and did not identify any specific ongoing violations. App. 78a n.42; *see also* App. 77a. The assumption by the three-judge court that "the previously identified constitutional violations" were ongoing contravenes the PLRA. App. 77a. It is no answer to this argument to assert, as Appellees do, that (1) the State defendants have conceded constitutional violations of varying degrees both before and after the three-judge court was convened, or (2) none of the Appellants dispute the three-judge court's conclusion that "the unconstitutional denial of adequate medical and mental health care is caused, first and foremost, by the unprecedented crowding in California's prisons." *Plata* Appellees' Motion at 23-24. Appellant-Intervenors specifically requested from the

three-judge court a determination of what constitutional violations, if any, remained at the time of trial and offered to present evidence and argument that there were no such ongoing violations. The request and the offer of Appellant-Intervenors were refused by the three-judge court. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829) ("Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made as clear a record as you can."). Nor does any prior concession by the State preclude the Appellant-Intervenors from raising, and the Court from enforcing, the obligation of the three-judge court under the PLRA to determine what, if any, constitutional violations continued at the time of trial.[2]

Second, a prisoner release order may issue only if a plaintiff demonstrates – by clear and convincing evidence – that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). Here, the three-judge court's conclusion that no other alternatives to the Prisoner Release Order existed is belied by the court-appointed *Plata* Receiver who stated that, under his control, the California prison systems would not have any "difficulty in providing medical services [to the entire prison population] no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D

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[2] The PLRA specifically grants the Appellant-Intervenors the ability to intervene as of right in this proceeding based on the recognition by Congress that statutory intervenors play a crucial role in protecting public safety and have a legitimate interest in opposing issuance of a prisoner release order independent of positions adopted by the State. 18 U.S.C. § 3626(a)(3)(F).

thereto, at 30:00 minutes and 31:20 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656).[3] Nothing in the three-judge court's opinion or the Appellees motions reconciles the issuance of the Prisoner Release Order with the uncontroverted evidence adduced from the Receiver that no such order is necessary and that alternatives exist.[4]

Congress intended a prisoner release order be "the remedy of last resort." H.R. Rep. No. 104-21, at 25 (1995). The three-judge court erred by issuing the Prisoner Release Order notwithstanding viable alternatives that are currently underway, including the continued work of the Court-appointed Receiver and Special Master and the transfer of inmates to out-of-state facilities.[5] Accordingly, the Prisoner Release

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[3] The parties were limited to such "out-of-court" evidence from the Receiver because the three-judge court refused to permit discovery on the Receiver and refused to have him testify in court. *See* Protective Order re Deposition of Receiver (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Coleman* Docket No. 2577; *Plata* Docket No. 988).

[4] Indeed, on May 17, 2010, the Receiver sent correspondence to Appellant-Intervenor Assembly Member Martin Garrick urging support, not for a prisoner release order, but for passage of the final legislation necessary for construction of additional facilities targeted directly at further improving medical and mental health care in the California prisons. He stated, "[a]pproval of AB 552 in order to fund our negotiated construction plan will represent a significant step towards conclusion of the Federal Receivership." Letter from the Hon. J. Clark Kelso to the Hon. Martin Garrick, dated May 17, 2010. AB 552 has already been approved by the California State Senate in a bi-partisan 30-0 vote, including each of the Appellant-Intervenors that cast a vote.

[5] Appellees' contention that the transfer of California inmates to out-of-state facilities constitutes a "prisoner release order"

Order fails to comply with the PLRA's requirement that a court may issue such release orders only when "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

II. THE PRISONER RELEASE ORDER FAILS TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.

Any prisoner release order issued pursuant to the PLRA is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). For two reasons, the Prisoner Release Order does not satisfy the requirement mandated by Congress.

First, the three-judge court refused to consider whether previously-identified constitutional violations existed at the time of trial and, if so, the scope of such violations. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829) ("Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made

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under the PLRA raises an additional significant legal issue. *Plata* Appellees' Motion at 27-28; *Coleman* Appellees' Motion 29. Appellees do not cite to any decision from any jurisdiction to support their novel argument. So long as a California inmate remains incarcerated – in state or out of state – and subject to the jurisdiction of the State, no "prisoner release order" has been made for the simple reason that no prisoner has been released and the population of prisoners for which California is responsible has not thereby decreased.

as clear a record as you can."). Nor did the three-judge court endeavor to determine which, if any, of the 33 facilities within the California prison system currently fail to provide constitutional levels of care. *Id.* The result is an overbroad and overreaching systemwide release order that fails adequately to identify a present violation of Federal rights, and extends "further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

Second, the Receiver claims an ability to provide constitutional care "no matter what the population is." Spitzer Trial Decl., *supra*, ¶ 28 and Exhibit D, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656); *see also id.* at 31:20 minutes ("We believe we can provide constitutional levels of care no matter what the population is."). In contrast, it is undisputed that the Prisoner Release Order remains, at best, a partial and indirect approach to the claimed violations that alone would never resolve the violations. App. 134(a); Plata Appellees' Motion 21.

Consistent with the PLRA, a narrowly-tailored prisoner release order would not simply reduce the overall prison population but would instead focus directly on medical and mental health treatment issues such as staffing ratios, equipment and facilities, and record-keeping. Appellees concede as much when they argue that "[i]t is not the double-celling or percentage overcapacity by itself that

constitutes the violation, but the effect that overcrowding has on the State's ability to provide constitutionally adequate care." *Coleman* Appellees' Motion at 32-33.

III. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE "SUBSTANTIAL WEIGHT" TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY.

The PLRA requires any three-judge court contemplating a prisoner release order to give "substantial weight" to any adverse impact on public safety or the operation of a criminal justice system. 18 U.S.C. § 3626(a)(1)(A). The three-judge court's disregard of this mandate raises a profoundly significant question of law that impacts directly the lives and safety of millions of Americans.

Although the three-judge court acknowledged that Congress intended release orders as "the remedy of last resort," the three-judge court (and Appellees) failed properly to consider the impact that the release of at least 38,000 prisoners will have on public safety in California. Instead, the three-judge court, without record support, asserted "that means exist by which the defendants can accomplish the necessary [release of at least 38,000 prisoners] without creating an adverse impact on public safety or the operation of the criminal justice system." App. 258a.

As a preliminary matter, the conclusion of the three-judge court regarding the possibility of a 38,000 inmate release being implemented without an adverse impact on public safety is impossible to reconcile with the undisputed trial testimony that

California has an approximately 70% recidivism rate (*see* App. 189a) and that research shows that each inmate commits approximately 12 crimes before being apprehended, tried, convicted and sentenced to state prison. *See* Trial Tr. (Police Chief Jerry Dyer) 2315:04-2318:20 (E.D. Cal./N.D. Cal. Dec. 12, 2008) (*Coleman* Docket No. 3541.13; *Plata* Docket No. 1939).

Moreover, this Court has never defined what a three-judge court must do in order to comply with the PLRA's requirement that "substantial weight" be given to any adverse impacts on public safety and the criminal justice system. If the requirement means anything, it must require, at a minimum, the three-judge court to evaluate carefully the impact each element of a proposed release order would likely have on public safety. In this case, the three-judge court admits, "we have not evaluated the public safety impact of each element of the State's proposed plan." App. 259a. In addition to not evaluating the individual elements of the implementation plan for the Prisoner Release Order, the three-judge court also emphasized that, "we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan, only that the State reduce the prison population to the extent and at the times designated in this Order." App. 261a.

Finally, the three-judge court acknowledged concerns regarding implementation of its order and funding of programs necessary to promote public safety, but its Prisoner Release Order includes no provision whatsoever designed to ensure public safety. Instead, the three-judge court holds that the State, rather than the court, should evaluate whether counties will need additional funding to ensure that

the Prisoner Release Order does not jeopardize public safety.[6] Most significantly, the Prisoner Release Order lacks any provision whatsoever to account for the return to California communities of at least 38,000 prisoners to be released. In sum, the three-judge court's failure to give any weight, let alone "substantial weight," to public safety prior to issuing the Prisoner Release Order is contrary to the PLRA.

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[6] The three-judge court observed that "[c]ounties may well require additional financial resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures." App. 261a. But the three-judge court refused to address that issue and instead leaves it to the State, stating, "whether public safety requires such a reallocation [of savings realized from the release of prisoners] demands serious consideration by the State, both under its general responsibilities to the public and in accord with the PLRA." *Id.* However, it is the three-judge court – not the State of California – that has a responsibility to ensure that any prisoner release order is in accord with the PLRA.

CONCLUSION

The Court should note probable jurisdiction, reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

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